

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals, District of Columbia

OCTOBER TERM, 1912.

No. 2435.

929

No. 4, SPECIAL CALENDAR.

UNITED STATES OF AMERICA EX RELATIONE EDITH G.
SOUTHWICK, APPELLANT,

vs.

WALTER L. FISHER, SECRETARY OF THE INTERIOR.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED JUNE 13, 1912.

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COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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In the Court of Appeals of the District of Columbia.

No. 2435.

UNITED STATES OF AMERICA ex Relatione EDITH G. SOUTHWICK,
Appellant,

vs.

WALTER L. FISHER, Secretary of the Interior.

a Supreme Court of the District of Columbia.

At Law. No. 54419.

UNITED STATES OF AMERICA ex Relatione EDITH G. SOUTHWICK,
Relator,

vs.

WALTER L. FISHER, Secretary of the Interior, Respondent.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Petition for Writ of Mandamus.*

Filed February 27, 1912.

In the Supreme Court of the District of Columbia.

At Law. No. 54419.

UNITED STATES OF AMERICA ex Relatione EDITH G. SOUTHWICK,
Relator,

vs.

WALTER L. FISHER, Secretary of the Interior, Respondent.

To the Chief Justice and Associate Justices of the Supreme Court of the District of Columbia:

Comes now the Relator, Edith G. Southwick, and for cause of action states:

1—2435a

First. That she is a citizen of the United States and a resident of the City of Portland, State of Oregon and brings this action in her own right.

Second. That the Respondent, Walter L. Fisher, is a citizen of the United States, resident of the District of Columbia and Secretary of the Interior and is sued herein in his official capacity as Secretary of the Interior.

Third. That on March 22, 1900, relator filed at the United States Land Office at Oregon City, Oregon, application to enter, under the homestead laws of the United States, the South half of the south half of section 2, Township 10 South, Range 11 West, W. M., said lands being situated in said land district in said state, which said application was duly allowed being numbered 15,305; that on

2 September 20, 1904 relator submitted her final proof on said entry; that on November 3, 1906, one Charles W. Lovegren

initiated a contest against said entry which was thereafter heard and finally decided by decision rendered September 21, 1909, in which decision the Secretary held the said entry for cancellation; that on December 21, 1909, relator caused to be filed in the Supreme Court of the District of Columbia a suit to enjoin the respondent from cancelling said entry pursuant to his said decision of September 21, 1909, which said suit was ordered dismissed by the Court of Appeals during the month of January, 1911; that on March 10, 1910, the then Secretary of the Interior signed an order directing the Commissioner of the General Land Office to instruct the Register and Receiver of the Portland, Oregon, Land Office to cancel relator's entry on the records of their office, to transmit said instructions by telegram and to have the local officers make return by telegram of their compliance with said order; that said instructions were sent as directed and the entry was cancelled on the books of the local officers on March 11, 1910; that on March 15, 1910, the First Assistant Secretary signed an order instructing the Commissioner to direct the local officers by telegram to suspend action on his order of March 10, 1910, and to permit no filing to be made on the land embraced in relator's entry; which order was duly transmitted by the Commissioner by telegraph to the local officers who received the same on March 15, 1910; that on March 17, 1910, the Secretary signed an order revoking in its entirety his previous order of March 10, 1910, and directing the Commissioner to reinstate relator's entry

3 on the records of the General Land Office and on the records of the local land office at Portland; that said entry was reinstated on the records of the General Land Office on March 17, 1910, and by letter dated April 16, 1910, the Commissioner advised the local officers at Portland of the reinstatement of relator's entry, of the complete revocation of the order of cancellation dated March 10, 1910, and directing said local officers to "note said action on your records; that said entry remained of record until July 22, 1910, when it was again cancelled by order of the Secretary; that before the said entry was finally cancelled, and on July 13, 1910, the President issued an executive order withdrawing this land from entry, sale or other disposition, with the following proviso:

"Provided further, that there shall be excepted from the force and effect of this order of withdrawal all lands which are on this date embraced in any lawful homestead entry heretofore made or upon which any valid settlement has been made and is at such date being maintained and perfected pursuant to law;"

that on March 27, 1910, Charles W. Lovegren, contestant, applied at the Portland Land Office to enter the land and the local officers, pursuant to the order of the Secretary dated March 15, 1910, rejected his said application; that on December 20, 1910, the Commissioner of the General Land Office instructed the local officers by letter of even date to allow Lovegren to enter the land, basing his said allowance on an alleged settlement on the land by Lovegren commencing on or about April 1, 1910, which alleged settlement the Commissioner held was the initiation of a valid settlement right, and on January 5, 1911, the local officers pursuant to instructions placed the entry of Lovegren of record in the local land office at

4 Portland and said entry was thereafter placed of record on the books of the General Land Office; Relator represents that the Commissioner was without authority of law to allow the Lovegren entry as the land was on April 1, 1910, the date when Lovegren claims to have initiated a settlement right, embraced in the entry of relator, and that said land was in law embraced in relator's entry at all times between March 22, 1900 and July 22, 1910, during which time no valid settlement rights could have attached; that no rights could have attached to Lovegren by settlement or otherwise after the date of the order of withdrawal—July 13, 1910—or after relator's entry was cancelled on July 22, 1910; that the action of the Commissioner was, therefore, without authority of law and the entry allowed by him void ab initio.

Fourth. That on March 4, 1911, the President approved an Act of Congress, (36 Stat. L. 1356), which directed the Secretary to reinstate relator's entry and to pass the same to patent, provided relator filed proof with the department, under rules and regulations to be approved by the Secretary, and which proof satisfied the Secretary that relator had done and performed the separate things set out in the Act as requisite and necessary and provided also that when relator filed her application for the reinstatement of her entry there was no other entry of record covering the land. Relator represents that she filed her application for the reinstatement of her entry in due season and submitted proof in strict conformity with the regulations approved by the Secretary and that her case in all respects comes clearly within every provision of the Act of March 4, 1911, but that the Secretary by decision signed January 31, 1912, has

5 refused to consider the proof submitted by relator or to consider her case on its merits because at the time relator filed her application for the reinstatement of her entry, the entry allowed by the Commissioner and placed of record January 5, 1911, by Lovegren was of record. Relator represents that the law, Act of March 4, 1911, related only to valid entries and not entries allowed without authority of law; that the entry of Lovegren was allowed without authority of law and has, therefore, never had any legal

existence and was not in law of record when relator filed her application for the reinstatement of her former entry.

Fifth. Relator represents that the Secretary has refused to perform his plain duty as directed by the Act of March 4, 1911, and determine her rights to the land under said Act; that she is without relief save by this proceeding; that unless the Secretary is required by order of this court to consider and determine her case on its merits she will be deprived of property rights worth more than five thousand dollars which she is entitled to under the provisions of the Act of March 4, 1911.

Wherefore relator prays:

(a) That copy, subpoena and all proper process issue directed to the respondent, Walter L. Fisher as Secretary of the Interior, requiring him to appear on a day certain and answer fully the exigencies of this bill.

(b) That upon final hearing of this cause the writ of mandamus issue directed to the respondent, Walter L. Fisher as Secretary of the Interior, requiring him to consider and determine the right of relator to said land upon the record of the case now before the department and in conformity with the requirements of the Act of March 4, 1911.

(c) That relator be given such other and further relief as to the court may seem just and proper.

EDITH G. SOUTHWICK.

WEBSTER BALLINGER,
Attorney.

STATE OF OREGON,
County of Multnomah, ss:

Edith G. Southwick being by me first duly sworn according to law deposed and said; That she is the relator in the above and foregoing petition by her subscribed; that she has read the same and knows the contents thereof; that the matters and things therein stated of her own knowledge are true and those stated on information and belief she believes to be true.

EDITH G. SOUTHWICK.

Subscribed and sworn to before me this 16 day of February, A. D. 1912.

[SEAL.]

P. A. LAFFERTY.

Rule to Show Cause.

Filed February 27, 1912.

* * * * *

Upon consideration of the petition filed by the relator in the above entitled cause, it is, by the Court this 27th day of February, 1912, ordered that Walter L. Fisher, the defendant, show cause on the 19th day of March, 1912, why the writ of mandamus should not be issued against him as prayed in the

petition; provided, that copy of this order and of said petition be served on the defendant on or before March 5, 1912.

By the Court:

ASHLEY M. GOULD, *Justice.*

Acceptance of Service.

Filed February 27, 1912.

* * * * *

Service of copy of the petition filed in the above entitled cause and of copy of the rule to show cause is accepted this 27th day of February, 1912.

C. E. WRIGHT,
Attorney for the Respondent.

Respondent's Answer.

Filed March 19, 1912.

* * * * *

Comes now Walter L. Fisher, Secretary of the Interior, and in answer to the rule to show cause in the above-entitled action, says:

8 By sections 441 and 453 of the Revised Statutes of the United States, respondent and his predecessors in office, as Secretary of the Interior, have at all times since the making of the entry here in question, been charged with the administration of all laws and with the execution of all duties appertaining to the purchase, selling, care, and disposition of the public lands of the United States; that the administration of those laws and the discharge of those duties involve on the part of respondent the exercise of judicial functions and discretion, and not merely the performance of ministerial duties; that among these duties thus requiring the exercise of judgment and of judicial functions as aforesaid, is the decision of all questions affecting the validity of any entry made upon any part of the public domain under the public land laws of the United States, when the same shall have been brought to his attention in the due and regular course of administration and in the manner provided by law and the regulations authorized thereunder; and that the decision of all such questions by your respondent is exclusively within his jurisdiction and is not reviewable by mandamus or other direct proceedings in any court of law or equity.

Further answering, respondent avers that in the exercise of his jurisdiction as aforesaid, and after due notice and opportunity to be heard on the part of the relator, when the matter was brought before your respondent for examination, consideration, and determination in the due and regular course of business, respondent decided, upon the record made, that at the time of relator's application made under and pursuant to the provisions of the act of March
9 4, 1911, as averred in paragraph 4 of the petition herein filed, there was another entry, that is to say, the entry made

by Charles W. Lovegren, as set forth in said petition, lawfully made and lawfully of record, covering the land described in said petition, and that relator had no right to said land upon the record of the case, under the provisions of the act of March 4, 1911, aforesaid, or under any law of the United States.

Wherefore, having fully answered the petition, respondent prays that the rule herein issued be discharged, that said petition be dismissed with his reasonable costs, and that he may go hence without day.

WALTER L. FISHER,
Secretary of the Interior.

CHARLES W. COBB,
Assistant Attorney General;
F. W. CLEMENTS,
First Assistant Attorney;
C. EDWARD WRIGHT,
Assistant Attorney,
For Respondent.

DISTRICT OF COLUMBIA, ss:

Walter L. Fisher, being first duly sworn, says that he has read over the foregoing answer by him subscribed and knows the contents thereof: that the matters and things therein set forth he is informed are true and he believes them to be true.

WALTER L. FISHER,
Secretary of the Interior.

Subscribed and sworn to this 18th day of March, 1912, before me,

[SEAL.]

W. BERTRAND ACKER,

[L. S.]

Notary Public for the District of Columbia.

10 Service acknowledged this 18 day of March, 1912.

WEBSTER BALLINGER,
Attorney for Relator.

Demurrer.

Filed March 19, 1912.

* * * * *

Comes now the relator in the above entitled cause by her attorney Webster Ballinger and says that respondent's answer to her petition filed herein is bad in substance, in that:

First. That respondent's answer either admits or is silent upon all the allegations of fact stated in the petition.

Second. That said answer admits that on March 27, 1910, on which date Charles W. Lovegren applied at the Portland, Oregon Land Office to enter the land and was refused an entry, and on April 1, 1910, when the said Lovegren claims to have settled on the land in controversy that the said land was embraced in relator's entry which was of record and remained of record until after the

Executive order of withdrawal dated July 13, 1910, and therefore, Lovegren could have initiated no valid settlement right thereon at any time within said period.

Third. That said answer admits that the Commissioner's order dated December 20, 1910, directing the local officers to allow Lovegren to enter the land was based solely upon an alleged settlement on the land commenced by Lovegren about April 1, 1910, and continued down to the date of the Executive order of withdrawal during all of which time the land was embraced in relator's entry which was of record.

Fourth. The facts stated in relator's petition and not denied in respondent's answer show that the entry allowed Lovegren by the Commissioner's letter dated December 20, 1910, was contrary to the provisions of the Executive Order of withdrawal and therefore, without authority of law, and that on March 27, 1911, when relator filed her application for the reinstatement of her former entry under the provisions of the Act approved March 4, 1911, there was no other entry lawfully of record covering the land.

Wherefore, relator prays that the writ of mandamus issue directed to the respondent as prayed in the petition.

WEBSTER BALLINGER,
Attorney for Relator.

Service accepted this — day of March, A. D., 1912.

_____.

To Messrs. Charles W. Cobb, F. W. Clements, and C. Edward Wright, attorneys for Walter L. Fisher:

Take notice that the foregoing will be for hearing on the 29th day of March, 1912.

WEBSTER BALLINGER,
Attorney for Edith G. Southwick.

Service accepted this 19 day of March, A. D., 1912.

C. EDW. WRIGHT,
Att'y for Resp't.

12 Supreme Court of the District of Columbia.

FRIDAY, April 12, 1912.

Session resumed pursuant to adjournment, Mr. Justice Stafford, presiding.

* * * * *

Upon consideration of the Relator's demurrer to the Respondent's answer to the rule to show cause herein, it is ordered that said demurrer be, and it is hereby overruled; whereupon, the Relator by her Attorney now in open Court says that she will stand upon her demurrer.

Therefore, it is considered that the rule to show cause herein be, and the same is hereby discharged, the petition dismissed, and that the Respondent recover against the Relator, the costs of his defense, to be taxed by the Clerk, and have execution thereof.

From the foregoing the Relator by her Attorney in open Court notes an appeal to the Court of Appeals of the District of Columbia, and the penalty of the bond for costs on said appeal is hereby fixed in the sum of one hundred dollars (\$100.).

Memoranda.

May 6, 1912.—Time to file record extended to June 15, 1912, inclusive.

Appeal bond approved and filed.

13

Assignments of Error.

Filed May 15, 1912.

* * * * *

First. The Court below erred in holding that the Commissioner of the General Land Office could lawfully allow the application of Charles W. Lovegren to enter the land in question by the order signed December 20, 1910, on the admitted facts then before him.

Second. The Court erred in holding that the entry allowed Charles W. Lovegren by order of the Commissioner dated December 20, 1910, and thereafter placed of record, had any existence in law and that it was in law of record, when relator filed her application, on March 27, 1911, under the authority contained in the Act approved March 4, 1911, for the reinstatement of her former entry and the adjudication of her claim under said Act.

Third. That the Court erred in holding that the finding of the Secretary of the Interior that on March 27, 1911, when relator filed her application for the reinstatement of her former entry, that there was of record a lawful entry allowed Charles W. Lovegren and that said finding of the Secretary was a finality and unreviewable by that court.

Fourth. That the Court erred in holding that upon the admitted state of facts found by the Commissioner and upon which his order of December 20, 1910, was based, that his authority under the law to have allowed said entry of Lovegren, presenting
14 solely a legal question, cannot be determined in this proceeding, and that the action of the Secretary in refusing to consider relator's application filed March 27, 1911, was final.

Fifth. That the Court erred in overruling relator's demurrer to respondent's answer and in dismissing relator's petition.

WEBSTER BALLINGER,
Attorney for Appellant.

15 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 14, both inclusive, to be a true and correct transcript of the record, according to Rule Five of the Court of Appeals of the District of Columbia, in cause No. 54419 at law, wherein United States of America, ex relatione, Edith G. Southwick, is Relator and Walter L. Fisher, Secretary of the Interior is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 27th day of May, 1912.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2435. United States of America ex relatione Edith G. Southwick, appellant, vs. Walter L. Fisher, Secretary of the Interior. Court of Appeals, District of Columbia. Filed Jun- 13, 1912. Henry W. Hodges, clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

AUG.-28-1912

Henry W. Rodgers.
Blk.

IN THE
COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

October Term, 1912.

No. 2435.

No. 4, SPECIAL CALENDAR.

UNITED STATES OF AMERICA ex Relation EDITH G.
SOUTHWICK, Appellant,

vs.

WALTER L. FISHER, Secretary of the Interior.

APPELLANT'S STATEMENT.

WEBSTER BALLINGER,

Counsel for Appellant.

IN THE
COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

October Term, 1912.

No. 2435.

No. 4, SPECIAL CALENDAR.

UNITED STATES OF AMERICA ex Relatione EDITH G.
SOUTHWICK, Appellant,

vs.

WALTER L. FISHER, Secretary of the Interior.

APPELLANT'S STATEMENT.

1. *The Appeal.*

This appeal (Rec. pp. 7-8) seeks to reverse the judgment of the Supreme Court of the District of Columbia, overruling appellant's demurrer to appellee's answer to appellant's bill and dismissing said bill.

2. *General Nature of the Case.*

The land in controversy was regularly entered by appellant March 22, 1900, at the U. S. Land Office at Oregon City, Oregon, under the homestead laws of the United States. Charles W. Lovegren filed a contest

against said entry November 3, 1906, which was finally decided by the Secretary September 21, 1909, said entry being held for cancellation. Suit was then filed in the Supreme Court of the District of Columbia to enjoin cancellation of the entry. On March 10, 1910, the then Secretary instructed the Commissioner of the General Land Office to cancel said entry on the books of his office and to direct by wire the local officers to cancel said entry on the records of their office, which orders were duly delivered and complied with, on March 11. On March 15, the Secretary directed the Commissioner, and through him the local officers, to suspend action on his order of the 10th instant, and to allow no filing to be made on the land, and on March 17th he signed another order revoking in its entirety his order of the 10th instant and directing the reinstatement of the entry. The entry was reinstated on the records of the General Land Office on March 17, and by letter dated April 16, 1910, the Commissioner advised the local officers of the reinstatement of said entry, of the revocation in its entirety of the order of March 10 and directed said officers "to note said action on your records." The entry remained of record until finally cancelled July 22, 1910, pursuant to an order of the Secretary dated July 20, 1910. Before cancellation on July 22, the President on July 13, issued an executive order withdrawing this land from entry, sale or other disposition, with the following proviso:

"Provided further, that there shall be excepted from the force and effect of this order of withdrawal all lands which are on this date embraced in any lawful homestead entry heretofore made or upon which any valid settlement has been made and is at such date being maintained and perfected pursuant to law."

On March 27, 1910, ten days after the Secretary's order of March 17, revoking in its entirety his order of the 10th instant and directing the reinstatement of appellant's entry and after appellant's entry had been in fact reinstated on the records of the General Land Office—one Charles W. Lovegren applied at the local land office to enter the same land and the local officers, pursuant to the Secretary's instructions of March 15, rejected his application. By letter dated December 20, 1910, the Commissioner directed the local officers to allow Lovegren to enter the land basing his allowance upon an alleged settlement on the land by Lovegren on or about April 1, 1910, which the Commissioner held was the initiation of a valid settlement right. It will be noted that on April 1, 1910, the date when Lovegren claims to have made settlement, the land was then embraced in appellant's entry which entry remained of record until after the Executive Order of withdrawal dated July 13, 1910. Pursuant to the Commissioners' instructions the local officers on January 5, 1911, allowed Lovegren to enter said land. It is the claim of appellant that upon the admitted facts the Commissioner had no authority to allow Lovegren's entry as the land was not on April 1, 1910, or at any time thereafter and prior to the Executive Order of withdrawal—July 13, 1910—subject to entry, as it was not then public land, it being during said entire period segregated from the public domain by appellant's record entry which precluded Lovegren from initiating any valid settlement thereon; that if Lovegren went upon said land on April 1, 1910, and remained thereon until July 13, 1910, as he claims he did, and as the Commissioner found, he was there as a trespasser or squatter and acquired no legal rights thereby.

Appellant, in her bill, (Rec. pp. 3-4, pars. 4, 5), then says:

Fourth. That on March 4, 1911, the President approved an Act of Congress, (36 Stat. L. 1356), which directed the Secretary to reinstate relator's entry and to pass the same to patent, provided relator filed proof with the department, under rules and regulations to be approved by the Secretary, and which proof satisfied the Secretary that relator had done and performed the separate things set out in the Act as requisite and necessary and provided also that when relator filed her application for the reinstatement of her entry there was no other entry of record covering the land. Relator represents that she filed her application for the reinstatement of her entry in due season and submitted proof in strict conformity with the regulations approved by the Secretary and that her case in all respects comes clearly within every provision of the Act of March 4, 1911, but that the Secretary by decision signed January 31, 1912, has refused to consider the proof submitted by relator or to consider her case on its merits because at the time relator filed her application for the reinstatement of her entry, the entry allowed by the Commissioner and placed of record January 5, 1911, by Lovegren was of record. Relator represents that the law, Act of March 4, 1911, related only to valid entries and not entries allowed without authority of law; that the entry of Lovegren was allowed without authority of law and has, therefore, never had any legal existence and was not in law of record when relator filed her application for the reinstatement of her former entry.

Fifth. Relator represents that the Secretary has refused to perform his plain duty as directed by Act of March 4, 1911, and determine her rights to the land under said Act; that she is without

relief save by this proceeding; that unless the Secretary is required by order of this court to consider and determine her case on its merits she will be deprived of property rights worth more than five thousand dollars which she is entitled to under the provisions of the Act of March 4, 1911.

3. *The Relief Prayed (Rec. p. 4) was:*

(b) That upon final hearing of this cause the writ of mandamus issue directed to the respondent, Walter L. Fisher as Secretary of the Interior, requiring him to consider and determine the right of relator to said land upon the record of the case now before the department and in conformity with the requirements of the Act of March 4, 1911.

(c) That relator be given such other and further relief as the court may seem just and proper.

4. *Appellee's Answer.*

Appellee filed an answer (Rec. pp. 5-6) in which he says that he refused to consider appellant's petition for the reinstatement of her former entry under the Act of March 4, 1911, because at the time said petition was filed "there was another entry, that is to say, the entry made by Charles W. Lovegren, as set forth in said petition, lawfully made and lawfully of record, covering the land described in said petition, and that said relator had no right to said land upon the record of the case under the provisions of the Act of March 4, 1911, aforesaid, or under any law of the United States." The answer contains no denial of any of the allegations of fact stated in appellant's petition, except that appellee contends that the allowance of the Lovegren entry was lawful.

5. *Appellant's Demurrer.*

To appellee's answer appellant filed a general demurrer, (Rec. pp. 6-7).

6. *Final Order and Judgment.*

On April 12, 1912, and after the case was heard on the demurrer, the demurrer was overruled and, appellant declining to plead further, judgment was entered for appellee, to which appellant duly excepted and prayed an appeal to this court (Rec. pp. 7-8).

7. *Assignment of Error.*

First. The Court below erred in holding that the Commissioner of the General Land Office could lawfully allow the application of Charles W. Lovegren to enter the land in question by the order signed December 20, 1910, on the admitted facts then before him.

Second. The Court erred in holding that the entry allowed Charles W. Lovegren by order of the Commissioner dated December 20, 1910, and thereafter placed of record, had any existence in law and that it was in law of record, when relator filed her application, on March 27, 1911, under the authority contained in the Act approved March 4, 1911, for the reinstatement of her former entry and the adjudication of her claim under said Act.

Third. That the Court erred in holding that the finding of the Secretary of the Interior that on March 27, 1911, when relator filed her application for the reinstatement of her former entry, that there was of record a lawful entry allowed Charles W. Lovegren and that said finding of the secretary was a finality and unreviewable by that court.

Fourth That the Court erred in holding that upon the admitted state of facts found by the Commissioner and upon which his order of December 20, 1910, was based, that his authority under the law to have allowed said entry of Lovegren, presenting solely a legal question, cannot be determined in this proceeding, and that the action of the Secretary in refusing to consider relator's application filed March 27, 1911, was final.

Fifth. That the Court erred in overruling relator's demurrer to respondent's answer and in dismissing relator's petition.

ARGUMENT.

1. *The Act Under Which Appellant Claims.*

The Act approved March 4, 1911, (36 Stat. L. 1356), under which appellant claims appellee was directed to consider her petition for reinstatement, provides:

That all pending homestead entries heretofore made within the former Siletz Indian Reservation in Oregon upon which proofs were made prior to December thirty-first, nineteen hundred and six, shall be passed to patent in all cases where it shall appear to the satisfaction of the Secretary of the Interior that the entry was made for the exclusive use and benefit of the entryman, and that the entryman built a house on the land entered and otherwise improved the same, and actually entered into the occupation thereof and cultivated a portion of said land for the period required by law, and that no part of the land entered has been sold or conveyed, or contracted to be sold or conveyed, by the entryman, and where no contest or other adverse proceeding was commenced against the entry and notice thereof served upon the entryman prior to the date of submission of proof

thereon, or within two years thereafter, *and where any such entry has heretofore been canceled the same may be reinstated upon application filed within six months from the passage of this Act where at the date of the filing of such application for reinstatement no other entry is of record covering such land.*"

2. *Proper Construction of the Statute.*

This being a remedial statute it should be "liberally constructed with reference to the purpose of its enactment," *Bechtel vs. U. S.* 101, U. S. 597; 25 L. Ed. 1019.

The statute in positive language commands the Secretary to pass all pending entries to patent where proof is submitted that satisfies him that the entryman has done and performed certain things specifically stated, and then adds:

"and where any such entry has heretofore been cancelled the same may be reinstated upon application within six months from the passage of this Act where at the date of the filing of such application for reinstatement *no other entry is of record covering such land.*"

It is the contention of appellant that the statute related to an entry lawfully allowed and valid upon the face of the record upon which it was allowed. It certainly could not have been the intention of Congress to exclude from the benefits of this Act a claimant whose claim came clearly within all its provisions as to entry, cultivation, improvements, etc., because of some unauthorized act of an administrative officer in allowing, contrary to law, another entry to have been placed of record.

3. *The Only Question In Issue.*

The real and only question herein presented for decision is: Can the appellee deny to appellant the benefits intended to be conferred upon her by the remedial Act of March 4, 1911, because of the unauthorized act of his subordinate—the Commissioner of the General Land Office—in allowing Lovegren to make an entry of record. Can he set up an unlawful act as justification for his refusal to consider appellant's petition for the reinstatement of her former entry? Appellant contends that the entry allowed Lovegren, and which was of record when she filed her application for reinstatement of her former entry under the remedial Act, was *void* upon the face of the record upon which the Commissioner acted and upon the facts found by him. It was not merely *voidable* because the facts shown by the record upon which the entry was allowed and found by the Commissioner, did not bring the Lovegren application within the requirements of the law authorizing the allowance of an entry. "The officers of the government are the agents of the law. They cannot act beyond its provisions nor make compromise not sanctioned by it." (Cunningham *vs.* Ashley, 14 Howard 377, 388.)

The Commissioner found as a fact in his decision allowing the Lovegren entry that Lovegren first settled upon the land April 1, 1910. This is not denied by appellee in his answer. On that date, the record shows, appellant's entry was in tact. Appellant's entry was first placed of record March 22, 1900, and remained of record until March 11, 1910, when, pursuant to the Secretary's order of March 10, 1910, it was cancelled. But on March 15 the Secretary by written order directed the Commissioner and the local officers to suspend action on

his order of the tenth instant and "to permit no filing to be made on the land embraced in relator's entry," and on the 17th instant by another signed order the Secretary revoked his order of the tenth instant in its entirety and directed the reinstatement of appellant's entry. As the reinstatement related back to the time of cancellation the land was at all times between March 22, 1900 and July 22, 1910, embraced in appellant's record entry. Before appellant's entry was cancelled on the records by order of the Secretary dated July 20, 1910, the President on July 13, 1910, signed an Executive Order withdrawing this land from entry, sale or other disposition, with the following proviso:

"Provided further, that there shall be excepted from the force and effect of this order of withdrawal all lands which are on this date embraced in any lawful homestead entry heretofore made or upon which any valid settlement has been made and is at such date being maintained and perfected pursuant to law."

Appellant alleged in his bill, and said allegation is not denied by appellee, that Lovegren applied to enter the land on March 27, 1910, "and the local officers, pursuant to the order of the Secretary dated March 15, 1910, rejected his said application." (Rec. p. 3, par. 3.) There is no claim that he ever had any entry of record prior to the date of the Executive Order. The Commissioner found (Rec. p. 3, par 3), that Lovegren first settled on the land on April 1, 1910, and was at the date of the Executive Order maintaining his residence on said land, and upon that finding of fact allowed Lovegren to enter the land under the proviso to the Executive Order of

withdrawal. The record is clear that on April 1, 1910, appellant's entry was of record and remained of record until after the Executive Order of July 13, 1910. Appellant contends that while her entry so remained of record the land was segregated from the public domain, was not public land subject to entry, that this was recognized by the department when it refused to allow Lovegren's application made March 27, and therefore Lovegren could not have initiated any valid rights therein by settlement thereon; that if he was on the land as found by the Commissioner, he was there as a trespasser and squatter. In *Hodges vs. Colcord*, 193 U. S. 191, 48 L. Ed. 677, 678, the court says:

"Generally a homestead entry while it remains uncanceled withdraws the land from subsequent entry. Such has been the ruling of the Land Department. In *Re Cliff*, 3 Land Dec. 216, 218, it was said by Secretary Teller:

"Under the present ruling of this Department, entries of record *prima facie* valid appropriate the lands covered thereby, and, while they remain uncanceled, the land is not subject to further entry." (Citing decisions.)

"The same proposition was affirmed in *Re Laird*, 13 Land Dec. 147, 150, the question arose as to an entry in Oklahoma, and Secretary Smith discussed it in these words: 'Although White had entered the Oklahoma country during the prohibitory period, yet his homestead entry was *prima facie* valid. Its invalidity had to be established by extraneous evidence, and a judgment as to its invalidity pronounced by a competent tribunal. Had that never been done, the tract covered by said entry would have remained forever segregated from the public domain; so far at least as the unquestioned legality of the entry itself could accomplish that fact. Hence it cannot be re-

garded as void, but voidable only. True, White lacked one of the essential qualifications of an entryman for Oklahoma lands. But it has been held that the entry of an alien (who also lacks the very essential qualifications of citizenship) is not void, but voidable.' " (Citing cases.)

"Being voidable only, White's entry segregated the land so long as it remained of record."

"In *Jones vs. Arthur*, 28 L. D. 235, it was decided that 'land in the actual possession and occupancy of one holding the same under claim and color of title is not subject to homestead entry.' See also *Butler vs. California*, 29 L. D. 610. In *Witherspoon vs. Duncan*, 4 Wall. 210; 18 L. Ed. 339, it was held that '*Lands originally public cease to be public after they have been entered at the Land Office, and a certificate of entry had been obtained;*' and in *Hastings & D. R. Co. vs. Whitney*, 132 U. S. 357, 35 L. Ed. 363, it was said by Mr. Justice Lamar (p. 361 L. Ed.) :

" 'In the light of these decisions the almost uniform practice of the department has been to regard land upon which an entry of record valid upon its face has been made, as appropriated and withdrawn from subsequent homestead entry, pre-emption settlement, sale, or grant until the original entry be cancelled or declared forfeited; in which case the land reverts to the government as part of the public domain and becomes again subject to entry under the land laws.' "

See also *McMichael vs. Murphy*, 197 U. S. at 312; *Wood vs. Beach*, 156 U. S. 549.

The only exceptions to the above rule, viz. : that while an entry remains of record the land is effectually withdrawn from entry, sale or any form of disposition, is where the record upon which the entry was allowed shows on its face the disqualification of the entry-

man, or the land was not subject to entry when the application was allowed, or that the facts stated in the application upon which it was allowed and as found by the commissioner did not bring the claim within the requirements of the law as in the case at bar. In such cases the entry is void, not voidable.

Appellant's original entry, although valid when made and valid upon the face of the record, was shown upon subsequent investigation to be voidable and the Secretary by decision rendered September 21, 1909, so held. In order, however, to hold the case in statue quo during the pendency of the suit in the Supreme Court of the District of Columbia, and in aid of legislation then in process of enactment for appellant's relief, of which the court will take judicial notice, and to exclude the initiation of any rights in the land by any claimant, the Secretary retained appellant's entry in tact until after the Executive Order was signed which order in plain terms prohibited the allowance of the Lovegren entry. If such had not been the sole object and purpose of the Secretary the order of March 10, 1910, would not have been suspended by the order of March 15, and entirely revoked by the order of March 17, and appellant's entry reinstated and retained of record until after the Executive Order of withdrawal.

4. *The Statute having in positive language directed appellee to determine appellant's rights to the land, there is power in the court to compel performance.*

The entry of record, when appellant filed her application for reinstatement, being void, appellee could not lawfully have refused to have considered and decided her

petition on its merits. When he did so refuse it was not only within the power of the court, but its duty, to compel him to do so. The language of the statute is mandatory. In *West v. Hitchcock* 19 D. C. Appeals 333 at 346 this court said:

The history of adjudication on the subject of mandamus is sufficient to show that the courts should be cautious not to interfere with the independent freedom of action guaranteed by the Constitution and laws to the executive officers of government; but it is also sufficient to show that the writ of mandamus will be freely resorted to in order to enforce individual right against arbitrary action, however well intended such action may be, when the relator has no other available remedy. *Roberts v. U. S.* 176 U. S. 221.

In the case at bar appellant has a clear right to property worth in excess of five thousand dollars under a law of our country, passed for the relief of a worthy class of our citizens. Appellee has refused to even consider her case. Her only relief from the arbitrary action of appellee is by this appeal to the court for the issuance of the writ of mandamus.

5. *Relief Asked.*

The special relief prayed in the bill is indefinite and would not accomplish the relief sought. Under the prayer for general relief, however, the court has full power to grant such relief as is proper and necessary (*Silver vs. Todd*, 7 Wall 219, 19 L. Ed. 138, 141). The relief sought by appellant is the determination by the Secretary of her petition for the reinstatement of her

former entry under the Act of March 4, 1911, irrespective of the void entry allowed Lovegren and now of record.

Respectfully submitted.

WEBSTER BALLINGER,
Counsel for Appellant.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

OCT-1--1912

Henry W. Hodges
In the Court of Appeals of the District of Columbia.

OCTOBER TERM, 1912.

No. 2435.

SPECIAL CALENDAR, No. 4.

UNITED STATES *ex rel.* EDITH G. SOUTHWICK,
APPELLANT,

v.

WALTER L. FISHER, SECRETARY OF THE INTERIOR.

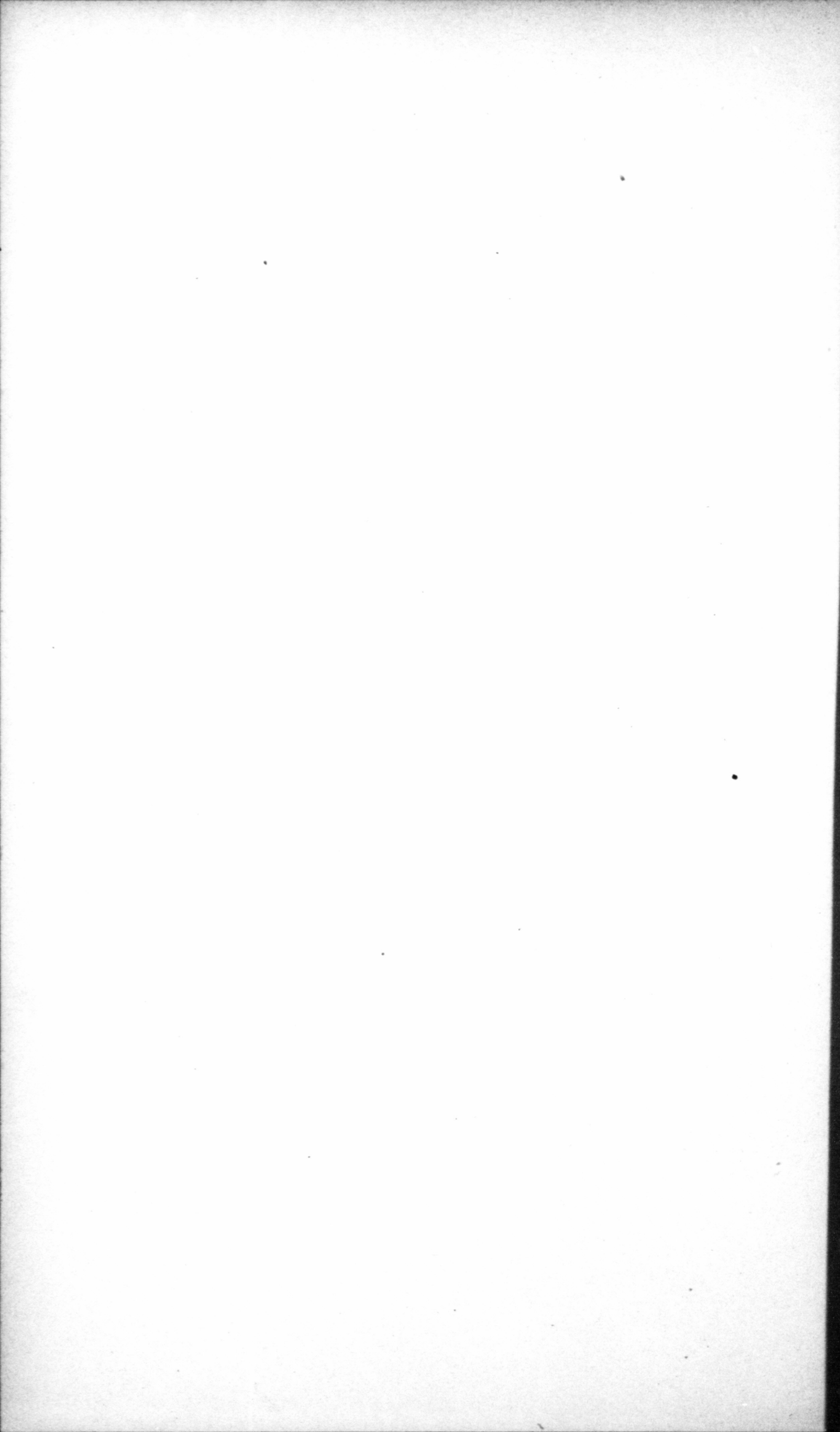
APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

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In the Court of Appeals of the District of Columbia.

OCTOBER TERM, 1912.

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SPECIAL CALENDAR, No. 4.

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WALTER L. FISHER, SECRETARY OF THE INTERIOR.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT
OF COLUMBIA.

BRIEF OF APPELLEE.

This is a proceeding for the purpose of compelling the appellee to consider and determine the right of appellant to certain land "upon the record of the case now before the department and in conformity with the requirements of the act of March 4, 1911." (Record, p. 4.) The answer sets forth that the appellee has already considered and determined the rights of the appellant to the land and has decided

that she has no right to it, upon the record of the case, under the provisions of the act of March 4, 1911, *supra*; or, for that matter, under any law of the United States. (Record, pp. 5-6.) Appellant's demurrer to the answer admits this to be the fact; and it would seem that the case, on the pleadings, presents merely a moot question—unless the purpose of the suit and of this appeal is to secure a review of the Secretary's action in the courts, a purpose appellant claims is covered by her prayer for general relief.

The act approved March 4, 1911 (36 Stat., 1356), provides:

That all pending homestead entries heretofore made within the former Siletz Indian Reservation in Oregon upon which proofs were made prior to December thirty-first, nineteen hundred and six, shall be passed to patent in all cases where it shall appear to the satisfaction of the Secretary of the Interior that the entry was made for the exclusive use and benefit of the entryman, and that the entryman built a house on the land entered and otherwise improved the same, and actually entered into the occupation thereof and cultivated a portion of said land for the period required by law, and that no part of the land entered has been sold or conveyed, or contracted to be sold or conveyed, by the entryman, and where no contest or other adverse proceeding was commenced against the entry and notice thereof served upon the entryman prior to the date of submission

of proof thereon, or within two years thereafter, *and where any such entry has heretofore been canceled the same may be reinstated upon application filed within six months from the passage of this act where at the date of the filing of such application for reinstatement no other entry is of record covering such land.*

After the passage of the act, appellant presented her application to the Secretary of the Interior asking that an alleged former entry of hers be reinstated. She set forth therein facts which she claimed brought her within the purview of the act and entitled her to the relief she asked. She submitted that application to the Secretary because he was charged with the duty of administering and executing it; of adjudging all applications thereunder—a duty and jurisdiction which, we shall see, was exclusively reposed in him.

She submitted to the Secretary all of the facts and asked him to give them consideration and adjudge that she was one of the persons described in the act, that she had met all of the requirements thereof, that her application was filed in time, and that at the time of her application there was “no other entry of record covering such land.” Pursuant to her application and the duty and jurisdiction imposed upon him by the act, the Secretary gave due and careful consideration thereto, found the facts, and finally adjudged that she was not entitled to the relief asked. She (perhaps naturally) did not agree with the Secretary; and she seems to be still disagreeing with him and his findings of fact and conclusions of law.

She, therefore, went to the Supreme Court of this District and asked that court to have a hearing on the facts and the law between her and the Secretary, or, to review the record and the findings and judgment of the Secretary, and to take her view of the situation, set aside the view of the Secretary and direct the latter to enter a judgment in accordance with her views of the law and the facts. But this that court very properly concluded that it could not and would not do—that mandamus was not invented for such things. Thereupon she appealed to this court, and asks this court to conclude that she is right, and, if it agrees with her, to substitute its and her judgment for that of the Secretary, and compel the latter to enter a judgment entirely contrary to what his mature judgment as to the law and the facts was and is, notwithstanding that judgment was given in a matter of which he had exclusive jurisdiction.

Now, there are a good many things the Secretary had to consider—a good many things which the act in question compels him to consider, and which the appellant when she filed her application asked him to consider: all of which he did consider and adjudicate. He had to conclude, first, that she had, before March 4, 1911, made a homestead entry in the Siletz Indian Reservation; that she had made her proofs thereon prior to December 31, 1906; and he had to be satisfied (for the act says that it shall “appear to the satisfaction of the Secretary of the Interior”) and adjudge that the entry was made for the exclusive use and benefit of the entryman; that she built

a house on the land; that she otherwise improved the same; that she actually entered into the occupation thereof; that she cultivated a portion of the land for the period required by law; that no part of the land has been sold or conveyed, or contracted to be sold or conveyed, by her; that no adverse proceeding was commenced against the entry and notice thereof served on her prior to the date she submitted proof, or within two years thereafter; that the entry had, before March 4, 1911, been canceled; that her application had been filed within six months from the passage of the act; and that at the time of her application "no other entry is of record covering such land."

The Secretary found, among other things, that at the time she made her application there was another entry of record covering the land. That ended her case and the Secretary had to, and did, so adjudge. She says there was not another entry—that the Secretary was wrong, and she wishes this court so to hold after reviewing the record. The Secretary might have found that there was no other entry and still have found that she had not built a house on the land or cultivated any of it—in short, that some other provision of the act had not been complied with. Doubtless, if such had been the case, she would have differed with the Secretary just the same and been here to-day asking this court to review the case and substitute her, and maybe its, judgment for that of the Secretary. It will thus be seen what a wide range of facts, on the one hand alleged and on

the other hand adjudicated, might in this manner be brought before the court.

Appellant, being compelled to admit that there was another entry of record covering the land, seeks to avoid this by saying that it was a void one. But, assuming that what appellant calls a void entry would not bar her application for reinstatement, the fact remains that the Secretary, after hearing her and giving the matter consideration, has decided that the entry which is of record is not a void one. So this contention adds nothing to appellant's standing in this suit, but simply opens up still another and a broader field of facts and circumstances and conditions and things for review and consideration; involving, too, the proposition as to whether or not all of these things were not questions solely between that entryman and the United States with which appellant had nothing to do—whether or not, at least when appellant's claim was finally and wholly disposed of and extinguished on the record and elsewhere long before the act in question was ever even thought of, all questions as between her and the United States as to this land were settled and she became an utter stranger; a condition, as to that entry, not changed by the act.

These are all things which the Secretary of the Interior must investigate and decide. The law imposes upon him that duty and invests him with that jurisdiction; and it is judicial. Besides that, it is exclusive.

Appellant in her petition in this suit prays:

That upon final hearing of this cause the writ of mandamus issue, directed to the respondent, Walter L. Fisher, as Secretary of the Interior, requiring him to consider and determine the right of relator to said land upon the record of the case now before the department and in conformity with the requirements of the act of March 4, 1911.

Now, in the face of this prayer, she alleges in her petition that the Secretary has already considered and determined her right to the land. In addition thereto, the appellee has made answer to the petition wherein he alleges that he has already passed upon appellant's application and has rejected it. The demurrer to the answer admits this. But appellant still urges the court to compel the Secretary to do what it is admitted he has already done. The prosecution of this suit would, therefore, seem to be purposeless.

Appellant seems to realize this, for she claims that she is entitled to other relief under the last division of her prayer, which reads as follows:

That relator be given such other and further relief as to the court may seem just and proper.

This other relief would appear from appellant's brief to be for the court to treat the matter as an appeal from the judgment of the Secretary and go into the question on its merits; listen to a controversy between her and the Secretary; examine into and find the facts and construe the law: All with a view

of determining whether the Secretary's judgment shall stand or another judgment—not his own, but that of the appellant, and maybe that of the court—shall be ordered to be substituted therefor.

This court and the Supreme Court of the United States have both held that this may not be done. The case is wholly controlled by the decisions in *Fisher v. United States ex rel. Grand Rapids Timber Co.* (37 App. D. C., 436); *United States ex rel. Ness v. The Secretary of the Interior* (223 U. S., 683); and the decision of this court in *United States ex rel. McKenzie v. Fisher*, decided May 6, 1912 (⁴⁰ Wash. Law Rep., 404).

The judgment should be affirmed.

Respectfully submitted.

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Assistant Attorney General,

F. W. CLEMENTS,
First Assistant Attorney.

C. EDWARD WRIGHT,
Assistant Attorney,
For the Appellee.

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